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No. 78-673

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIE DEWITT DAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 576 F. 2d 656.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1978. A petition for rehearing was denied on September 21, 1978 (Pet. App. 1b). The petition for a writ of certiorari was filed on October 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment adequately informed petitioner of the nature of the charge against him.

2. Whether petitioner was entitled to a judgment of acquittal at the conclusion of the government's case.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of aiding and abetting a bank robbery, in violation of 18 U.S.C. 2 and 2113(d). He was sentenced to 12 years' imprisonment. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial showed that on September 26, 1974, the Vina Branch of the First National Bank of Russellville was robbed of $15,569 by two masked gunmen (Tr. 81-86). The government's case against petitioner rested primarily on the testimony of the two gunmen involved in the robbery, Gordon Harrell and Gerald Jenkins.[1] Harrell testified that during the evening preceding the bank robbery, petitioner loaned him his rented car to assist in stealing a getaway car (Tr. 139, 143). After stealing the getaway car, Harrell and Jenkins returned to petitioner's home with a duffel bag containing guns and ammunition and remained there throughout the evening to make final preparations for the bank robbery (Tr. 137-151). The robbery plan called for petitioner to monitor the police frequency on a radio receiver in order to alert the robbers to any response by the police (Tr. 142).

Jenkins' testimony corroborated that of Harrell. Jenkins testified that petitioner was informed of the robbery plan, secured the rental car, and pointed out on a map the locations of several banks as targets for the robbery (Tr. 249-250).

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[1]Harrell had previously pleaded guilty to robbing the bank and was sentenced to ten years' imprisonment (Tr. 127-128). Jenkins also pleaded guilty and received a sentence of 12 years' imprisonment (Tr. 245).

At the conclusion of the government's case, petitioner moved for a judgment of acquittal, asserting that a fatal variance existed between the indictment and the government's proof at trial. The district court denied this motion, concluding that the government's evidence was sufficient to support a conviction for aiding and abetting the bank robbery and finding no variance between the evidence and the indictment (Tr. 412-413).

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the indictment was defective because it failed to give him adequate notice that he was charged as an aider and abettor. He argues that the indictment charged him as a principal, while the proof at trial showed that he was not present at the time of the bank robbery and did not directly participate in it.

But the indictment clearly alleged that petitioner had violated 18 U.S.C. 2 (the aiding and abetting provision) and 18 U.S.C. 2113(d) (the substantive bank robbery provision). Moreover, it is well settled that a defendant indicted as a principal may be convicted on evidence showing that his participation constituted aiding and abetting. See, *e.g.*, *United States* v. *Vines*, 580 F. 2d 850, 853 (5th Cir. 1978); *United States* v. *Leeper*, 413 F. 2d 123, 127 (8th Cir. 1969); *United States* v. *Ramsey*, 374 F. 2d 192, 196 (2d Cir. 1967); see also *United States* v. *Longoria*, 569 F. 2d 422, 424 (5th Cir. 1978). Moreover, petitioner does not suggest that he was misled by the indictment or prejudiced in the preparation of his defense by the asserted variance. The statutory provisions cited in the indictment disclosed the legal basis for the aiding and abetting charge, and the text of the indictment described the details of the bank robbery. In these circumstances, there is no basis for the assertion that the indictment failed to inform petitioner of the nature of the charge against him.

2. Petitioner further contends that he was entitled to a judgment of acquittal because the government's proof varied from the facts alleged in the indictment and because the proof was legally insufficient (Pet. 6-8). Petitioner concedes that "a person can be charged as a principal and convicted of aiding and abetting" (Pet. 6). As noted above, that rule of law is dispositive of his claim of variance. Moreover, the evidence establishing petitioner's guilt was "more than sufficient" (Pet. App. 4a). The testimony of the two principals in the robbery showed that petitioner assisted them by monitoring the police radio frequency, by obtaining a car used in preparation for the robbery, by pointing out potential robbery targets, and by providing accommodations in his home on the night preceding the robbery. Viewed in the light most favorable to the government (*Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 15-16; *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), the evidence supported petitioner's conviction, and the district court properly denied his motion for a judgment of acquittal.[2]

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[2]The cases cited by petitioner (Pet. 6-7) are not in point. *United States* v. *Short*, 493 F. 2d 1170 (9th Cir. 1974), reversed an aiding and abetting conviction where the district court failed to give the jury an adequate instruction on intent. The court noted that proof of the crime of aiding and abetting " 'must encompass the same elements as would be required to convict any other principal.' " (493 F. 2d at 1172). The district court in the present case clearly instructed the jury that "it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to succeed or bring about or accomplish" (Tr. 609). Moreover, the evidence at trial showed all of the elements of the substantive bank robbery offense that petitioner aided and abetted. The case of *Stephens* v. *United States*, 354 F. 2d 999 (5th Cir. 1965), is also irrelevant. That case dealt with the standard of review to be applied on appeal where the district court fails to act on a motion for acquittal. In the present case, the district court denied petitioner's motion because the evidence of his guilt was sufficient to go to the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979